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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 175

RIN 0790-AJ54

[Docket ID: DOD-2016-OS-0108]

Indemnification or Defense, or Providing Notice to the Department of Defense, Relating to a Third-Party Environmental Claim

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: The DoD is identifying the proper address and notification method for an entity making a request for indemnification or defense, or providing notice to DoD, of a third-party claim under section 330 of the National Defense Authorization Act for Fiscal Year 1993, as amended (hereinafter “section 330”), or under section 1502(e) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, (hereinafter “section 1502(e)"). This rule also identifies the documentation required to demonstrate proof of any claim, loss, or damage for indemnification or defense or for providing notice to DoD of a third-party claim. This rule also provides the mailing address for such requests for indemnification or defense or notice to DoD of a third-party claim to be filed with DoD, Office of General Counsel, the Deputy General Counsel for Environment, Energy, and Installations (DGC(EE&I)). This will allow for timely review and greater efficiency in screening requests for indemnification or defense by providing clarity to requesters.

DATES: This final rule is effective on [INSERT DATE 30 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Philip Sheuerman, 703-692-2287.

SUPPLEMENTARY INFORMATION:

Comments and Responses

On December 7, 2016 (81 FR 88167-88173), the Department of Defense published a proposed rule titled “Indemnification or Defense, or Providing Notice to the Department of Defense, Relating to a Third-Party Environmental Claim.” The proposed rule had a 60-day public comment period, which ended on February 6, 2017. One commenter submitted comments which are addressed in 11 responses below.

Comment #1: One comment argues that the rule does not properly distinguish between the statute of limitations applicable to a request for indemnification and any limitations on when a request for defense may be made. The comment also suggests that more detail should be included as to what constitutes accrual of the action.

Response #1: The rule simply provides that the request for defense must be received by the DGC(E&I) in sufficient time to allow the DoD to provide the requested defense (§ 175.6(b)). While the rule does identify the statutory limitation on making a request for indemnification, it does not identify a time limit for when a request for defense must be made. Since seeking defense is separate from making a request for indemnification (or providing notice of a third-party claim) and is entirely at the discretion of the requester, there is no direct connection between a request for indemnification and a request for defense. Section 330 describes accrual of action such that the rule does not address the matter further. As with many of the comments submitted, it is critical to distinguish among a request for indemnification, a request for defense, and submittal of notice of a

third-party claim; these are three separate and distinct actions. (For purposes of these responses, it is understood that the DoD will act through the Department of Justice when appearing before the courts.) No change is made to the rule.

Comment #2: One comment asserts that the requirements relating to notice of a third-party claim are unwarranted changes to the statutory provisions of section 330 and that certain unwarranted consequences will occur if a recipient of a third-party claim does not provide the required 30-day notice (see response to comment #4 for change to 15 days) of receipt of the third-party claim.

Among these asserted consequences is a denial of indemnification or defense.

Response #2: The rule provides a process to give effect to the provisions of section 330; in doing so, it does not expand or diminish the rights of the parties involved. The rule does not assign any consequences to not requesting defense; as noted in the answer to question #1, a request for defense is optional and requesting it is at the discretion of the recipient of a third-party claim. The only consequences occur when a recipient of a third-party claim fails to provide notice to the DGC(E&I) of receipt of the claim in time for the United States to choose to intervene. Section 330(c) makes it clear that the consequence of not allowing the DoD to defend against a third-party claim is that a subsequent request for indemnification will be denied. This rule provides reasonable notice and process to avoid such an eventuality due to a potential requester for indemnification being ignorant of or ignoring the statutory rights of the DoD. The comment fails to recognize that section 330 authorizes the DoD, at the option of the DoD, to intervene and defend against a third-party claim. To give substance to this authority, the recipient of a third-party claim must provide reasonable notice to the DoD in order to allow DoD to act. Otherwise, the ability of the DoD to intervene and defend would be ineffectual. Failure to provide the notice does not automatically void any subsequent request for indemnification; it only affects a subsequent request

for indemnification if it compromises the ability of the DoD to defend against the third-party claim. Such a determination is made within the discretion of the DGC(EE&I), based on the facts of the individual matter. To the extent that an assertion can be made that the rule modifies section 330, it would only be to the effect that the rule is more generous than section 330 because section 330 does not address when a failure to allow DoD to defend against a third-party claim does no harm to DoD. Section 330 simply provides that “the person may not be afforded indemnification” without further elucidation. No change is made to the rule.

Comment #3: One comment asserts that the rule is a unilateral amendment of existing real property transfer documents that provide for notice under section 330, and, as such, obscures the rights of the property recipient.

Response #3: This rule is entered into under the delegated authority of the Secretary of Defense relating to the implementation of section 330. It is separate and distinct from, and in addition to, any real property transfer document provisions that were not entered into under that authority.

There is no evidence that a request for indemnification or defense cannot meet both sources of requirements. Because DoD is aware of this concern, it notes in the preamble to this rule that for those situations where notice is to be given in accordance with, e.g., deeds, to other locations such as a local base closure program office, the DoD will continue to accept those notices for purposes of meeting the statute of limitations for a period of 180 days after this rule becomes final.

Subsequent to that date, compliance with this rule will constitute the only reliable means to ensure compliance with the requirements of section 330. No change is made to the rule.

Comment #4: One comment suggests that, while there are firm time limits imposed on the requester for indemnification or defense, there are no corresponding time limits imposed on the DoD.

Response #4: The only major time limit imposed on the requester relates to a notice of third-party claim. (The statute of limitations is statutory and is simply restated.) It is true as the comment notes that, in some situations, the 30-day limit on notices of a third-party claim may be too long. The DoD believes it best to set a firm limit rather than one that is variable for each situation and, therefore, unpredictable for the requester. The DoD does recognize, however, the legitimacy of the concern over the length of the period and has reduced it to 15 days. The DoD does not set a time limit on itself to respond to the request because of the complexities involved in gathering information from the DoD Component responsible for the former facility, the need to thoroughly and accurately assess the legal and factual issues, and the need for coordination with potentially several divisions within the Department of Justice and U.S. Attorney's Offices. The rule is changed as noted above.

Comment #5: One comment notes that the requirement that each individual file a separate request for indemnification or defense could be onerous, particularly in the situation of a class action lawsuit.

Response #5: The rule requires a request for indemnification or notice of third-party claim from each individual requester. The requirement does not apply to third-party claimants. There can be numerous third-party claimants against the requester. But each requester must represent itself. The DoD cannot be expected to discern the individual legal interests of multiple parties to a request for indemnification or defense. No change is made to the rule.

Comment #6: One comment suggests that the requirement to provide notice of a third-party claim should allow more informal notice so as to expedite delivery of notice and promote the likelihood of the DoD being able to exercise its right to defend against such a claim.

Response #6: The DoD recognizes the benefits of earlier notification (and the possibility of some

required records not being available on short notice) and has added a paragraph to § 175.5(g) that allows a requester to provide telephone notification, subject to subsequent written confirmation by the DGC(EE&I). Telephone numbers have been included in §§ 175.5(a) and 175.6(a). The inclusion of telephone numbers may also assist in delivery of packages by commercial delivery services. The rule is changed as noted above.

Comment #7: One comment suggests that § 175.5(d) indicates that, for example, a lender who does not own or control the site could seek indemnification or defense even though not eligible under section 330.

Response #7: While it is difficult to see how a lender who does not own or control the site would have an interest in seeking indemnification, let alone defense, section 330 does not appear to make such a distinction. The rule includes “lender” because “lender” is one of those entities eligible under section 330. No change is made to the rule.

Comment #8: One comment suggests that the definition of “requester” in §175.3 does not fully consider the situation of a subrogee (the draft rule incorrectly uses “subrogee” when it should use “subrogor” to refer to the entity from which the subrogee is taking its rights and has been corrected accordingly). This is particularly the case with the requirements to submit a notice of a third-party claim.

Response #8: Since a request for indemnification can be made within two years of accrual of the action, it is entirely feasible for, e.g., an insurance company to make a request for indemnification as subrogee of its insured. However, it is established law that a subrogee can only exercise the rights the subrogor itself had. Consequently, if a subrogor did not comply with the requirements of this rule and, in doing so, compromised the ability of DoD to defend against the claim, the subrogor would have no right to indemnification and its subrogee, which can only take its rights

from the subrogor, would likewise have no right to indemnification. No change is made to the rule except correcting the reference from “subrogee” to “subrogor”.

Comment #9: One comment suggests that the definition of “third-party claim” should discuss whether a citizen’s suit under the environmental laws would qualify as a third-party claim.

Response #9: This question is a matter that has not been addressed by the courts and the DoD is not inclined to attempt to resolve it in this rule. No change is made to the rule.

Comment #10: One comment inquires as to whether the requirement of § 175.5(d)(4) includes all insurance policies such as for workers compensation, automobile, errors and omissions, and directors and officers.

Response #10: The experience of DoD is that it cannot rely on a requester to choose which policies or parts of policies should be submitted. Doing so does not ensure that DoD will receive all relevant documentation. If this requirement poses a significant burden on a requester, the requester should discuss the matter with the DGC(EE&I), knowing that any resulting delay will be charged against the requester. No change is made to the rule.

Comment #11: One comment suggests that § 174.15 of title 32, Code of Federal Regulations, *Revitalizing Base Closure Communities and Addressing Impacts of Realignment*, be rescinded.

Response #11: Section 174.15 contains restrictions on when reference may be made to section 330 in base closure real property disposal documents. This restriction has served the disposal process well by eliminating disputes over, e.g., deed language that frequently was inconsistent with the actual terms of section 330. The comment does, however, indicate that it would be useful to change this proposed rule by inserting a cross-reference to § 174.15 noting that nothing in this rule alters the provisions of § 174.15. That change is made in § 175.2 with the addition of a new paragraph (c).

Legal Authority

This part is finalized under 10 U.S.C. 113, 5 U.S.C. 301, section 330 of the National Defense Authorization Act for Fiscal Year 1993, Public Law 102-484, October 23, 1992, 106 Stat. 2371, as amended, and section 1502(e) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Public Law 106-398, October 30, 2000, 1014 Stat. 1654A-350, as amended.

Background

Sections 330 and 1502(e) provide that, subject to certain exceptions set forth in the statutes, the Secretary of Defense shall hold harmless, defend, and indemnify in full certain persons and entities that acquire ownership or control of, in the case of section 330, any military installation closed pursuant to a base closure law or, in the case of section 1502(e), certain portions of the former Naval Ammunition Support Detachment on the island of Vieques, Puerto Rico (hereinafter “Detachment”), from and against any suit, claim, demand or action, liability, judgment, cost or other fee arising out of any claim for personal injury or property damage (including death, illness, or loss of or damage to property or economic loss) that results from, or is in any manner predicated upon, the release or threatened release of any hazardous substance, pollutant or contaminant, or petroleum or petroleum derivative¹ as a result of DoD activities at any military installation (or portion thereof) that is closed pursuant to a base closure law or the Detachment. (Coverage of pollutants and contaminants was added to section 330 by an amendment contained in the National Defense Authorization Act for Fiscal Year 1994, Public Law 103-160, § 1002.) They also provide that DoD has certain rights in defending third-party claims.

The authority to adjudicate requests for indemnification and process requests for defense under sections 330 or 1502(e) has been delegated from the Secretary of Defense to the DoD

¹ Section 1502(e) does not apply to petroleum or petroleum derivatives.

General Counsel and re-delegated by the General Counsel to the DGC(EE&I). Requests for indemnification or defense or notice to DoD of a third-party claim must be sent to the DGC(EE&I) to be considered.

The DoD recognizes that some real property transfer documents, such as deeds and agreements, entered into in past years provide that notification under sections 330 or 1502(e) be made to, e.g., the local BRAC program office. Prior to the publication of this final rule, DoD has honored such notifications made in conformance with those transfer documents. Effective 180 days after promulgation of this rule, while a requester may continue to provide notification in accordance with such transfer documents, a requester must also comply with the notice requirements of this rule in order to comply with the requirements of sections 330 or 1502(e), particularly with regard to when the statutes of limitation in sections 330(b)(1) and 1502(e)(2)(A) begin to run. Nothing in this rule should be construed as requiring amendment of any such transfer documents.

The United States Court of Appeals for the Federal Circuit has interpreted the definition of a “claim for personal injury or property damages” under section 330 to include, under certain circumstances, notice from a governmental enforcement agency to conduct a cleanup. *Indian Harbor Insurance Co. v. United States*, 704 F.3d 949 (Fed. Cir. 2013). Because such notices may constitute a claim under section 330, a requester should carefully evaluate whether failing to provide notice to the Secretary would prevent the Secretary from settling or defending against a claim.

The timely and proper filing of a request for indemnification or defense enables the DGC(EE&I) to perform its adjudication function for requests, maintain oversight of the implementation of sections 330 and 1502(e), and secure the rights of requesters under sections 330

and 1502(e). Proper notice to DoD of a claim from a third-party is essential to allow DoD to exercise its right to defend against such a claim pursuant to sections 330(c) or 1502(e).

Under sections 330(c)(2) and 1502(e)(3)(B), the requester must allow DoD to defend the claim in order to be afforded indemnification for that claim. This regulation makes clear that failure to notify DoD immediately of receipt of any claim could prevent DoD from settling or defending that claim, and on that basis, DoD may deny indemnification. Failure to provide necessary documents and access will also prevent DoD from exercising its right to settle and defend the claim and, on that basis, DoD may deny indemnification.

In the context of a claim from a governmental enforcement agency or third party seeking to require a cleanup or response action, failure to notify DoD may prevent DoD from exercising its right to defend against the claim. If the requester undertakes a cleanup or response action itself prior to providing immediate notice to DoD, the requestor's actions may interfere with DoD's ability to defend against a claim, which might result in denial of indemnification.

This final rule does not affect claims that are made pursuant to other authorities such as under a real property covenant contained in a deed in accordance with section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

DoD has received approximately 14 requests for indemnification since 2006. This represents an annual average of requests for indemnification of slightly more than one per year. DoD cannot fully estimate the cost of the current process upon requesters because the only times it has paid such costs are when a request for indemnification has been litigated and administrative costs paid as part of a settlement. That settlement cost, however, includes the cost of litigation, which is substantially greater than the cost of seeking an administrative settlement.

Administrative Requirements

A. Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”

E.O. 12866 defines “significant regulatory action” as one that is likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more or may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in E.O. 12866.

It has been determined that this rule is not a significant regulatory action. This rule has not been reviewed by OMB under the requirements of these Executive Orders.

B. Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs”

This rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, 5 U.S.C. § 601, et seq., requires Federal agencies to consider “small entities” throughout the regulatory process. Section 603 of the Regulatory Flexibility Act requires an initial screening analysis performance to determine whether small entities will be adversely affected by the regulation. No comments were received relating to the requirements of the Regulatory Flexibility Act. It has been certified that this final rule will not add to the current burden for small entities to report their activities based on a request for indemnification or defense under sections 330 or 1502(e).

D. Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. § 3501, authorizes the Director of OMB to review certain information collection requests by Federal agencies. The recordkeeping and reporting requirements of this final rule do not constitute a “collection of information” as defined in 44 U.S.C. § 3502(3), the Paperwork Reduction Act of 1995.

E. Environmental Justice

Under E.O. 12898 (59 FR 7629 (February 11, 1994)), Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Federal agencies are required to identify and address disproportionately high and adverse human health and environmental effects of Federal programs, policies, and activities on minority and low-income populations.

Sections 330 and 1502(e) are intended to reduce specified risks resulting from development of former military land by aiding and legally protecting the entities that take title to land on closed military installations for development purposes. Because this rule will equally affect, on a national basis, requests for indemnification associated with the development of land, a disparate impact on minority and low-income population areas is not expected.

F. Unfunded Mandates

Title II of the Unfunded Mandates Report Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Indian tribal governments and the private sector.

The DoD has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Indian tribal governments, in the aggregate, or the private sector in any one year. Thus, this final rule is not subject to the

requirements of Section 202 of the UMRA.

G. Executive Order 13132, “Federalism”

It has been determined that this rule does not have federalism implications. This rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 175

Indemnification, Claim

Accordingly, 32 CFR part 175 is added to read as follows:

**PART 175—INDEMNIFICATION OR DEFENSE, OR PROVIDING NOTICE TO THE
DEPARTMENT OF DEFENSE, RELATING TO A THIRD-PARTY ENVIRONMENTAL
CLAIM**

Sec.

- 175.1 Purpose.
- 175.2 Applicability.
- 175.3 Definitions.
- 175.4 Responsibilities.
- 175.5 Notice to DoD relating to a third-party claim.
- 175.6 Filing a request for indemnification or defense.

AUTHORITY: 10 U.S.C. 113, 5 U.S.C. 301, section 330 of the National Defense Authorization Act for Fiscal Year 1993, Public Law 102-484, October 23, 1992, 106 Stat. 2371, as amended, and section 1502(e) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Public Law 106-398, October 30, 2000, 1014 Stat. 1654A-350, as amended.

§ 175.1 Purpose.

This part describes the process for filing a request for indemnification or defense, or providing proper notice to DoD, of a third-party claim pursuant to section 330 of the National Defense Authorization Act for Fiscal Year 1993, Public Law 102-484, October 23, 1992, 106 Stat.

2371, as amended (hereafter “section 330”), or section 1502(e) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Public Law 106-398, October 30, 2000, 1014 Stat. 1654A-350, as amended (hereafter “section 1502(e)”). This process identifies the minimum information that a request for indemnification or defense or notice to DoD of a third-party claim for indemnification must include, where that information must be sent, how to make such a request or provide such a notice, the time limits that apply to such a request or notice, and other requirements.

§ 175.2 Applicability.

(a) This part applies to—

(1) The Office of the General Counsel of the Department of Defense and the Military Departments.

(2) Any person or entity making a request for indemnification or defense, or providing notice to DoD, of a third-party claim pursuant to section 330 or section 1502(e).

(b) In the case of a property that is subject to an earlier agreement containing different notification requirements, the requirement for notice to the Deputy General Counsel in sections 175.5 and 175.6 are in addition to those notification requirements.

(c) Nothing in this part alters the provisions of § 174.15 of this title.

§ 175.3 Definitions.

Commercial delivery service. Federal Express or United Parcel Service, or other similar service that provides for delivery of packages directly from the sender to the recipient for a fee, but excluding the United States Postal Service (USPS).

Deputy General Counsel. The Deputy General Counsel (Environment, Energy, and Installations), Department of Defense.

Received. Actual physical receipt by the intended recipient.

Request. Any request for indemnification or defense made to the Department of Defense (DoD) by a requester pursuant to section 330 or section 1502(e).

Requester. A person or entity making a request pursuant to section 330 or section 1502(e). When the requester is acting by way of subrogation, the requester is subject to the same requirements and limitations as though it were the subrogor.

Section 330. Section 330 of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102-484, October 23, 1992, 106 Stat. 2371, as amended.

Section 1502(e). Section 1502(e) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Public Law 106-398, October 30, 2000, 114 Stat. 1654A-350. (This provision applies only to certain portions of the former Naval Ammunition Support Detachment on the island of Vieques, Puerto Rico.)

Third-party claim. A claim from a person or entity (other than the requester) to a requester resulting from a suit, claim, demand or action, liability, judgment, cost or other fee, demanding, seeking, or otherwise requiring that the requester pay an amount, take an action, or incur a liability for alleged personal injury or property damage and such payment, action, or liability is eligible for indemnification or defense pursuant to section 330 or section 1502(e). A third-party claim may consist of a notice, letter, order, compliance advisory, compliance agreement, or similar direction from a governmental regulatory authority exercising its authority to regulate the release or threatened release of any hazardous substance, pollutant or contaminant, or petroleum or petroleum derivative if the notice, letter, order, compliance advisory, compliance agreement, or similar notification imposes, directs, or demands requirements for environmental actions or asserts damages related thereto that are eligible for indemnification or defense pursuant

to section 330 or section 1502(e).

§ 175.4 Responsibilities.

(a) The General Counsel of the Department of Defense has been delegated the authorities and responsibilities of the Secretary of Defense under section 330 and section 1502(e), with certain limitations as to re-delegation.

(b) The General Counsel has re-delegated the authority and responsibility to adjudicate requests for indemnification or defense and to process notices to DoD of a third-party claim under section 330 and section 1502(e) to the Deputy General Counsel or, when the position of Deputy General Counsel is vacant, the acting Deputy General Counsel. The authority to acknowledge receipt of a request has been delegated to an Associate General Counsel under the Deputy General Counsel.

§ 175.5 Notice to DoD relating to a third-party claim.

(a) *Where to file a notice to DoD of a third-party claim.* (1) Notice to DoD of receipt of a third-party claim, or intent to enter into, agree to, settle, or solicit such a claim, must be received by the Deputy General Counsel at the following address:

Deputy General Counsel
Environment, Energy, and Installations
1600 Defense Pentagon, Room 3B747
Washington, DC 20301-1600
(703-693-4895) or (703-692-2287)

(2) Delivering or otherwise filing a notice of a third-party claim with any other office or location will not constitute proper notice for purposes of this part. Requesters should be aware that all delivery services, and particularly that of the USPS, to the Pentagon can be significantly delayed for security purposes and they should plan accordingly in order to meet any required filing deadlines under this part; use of a commercial delivery service may reduce the delay.

(b) *Individual notices.* A notice to DoD of a third-party claim must be filed separately for each person or entity that is filing the notice. Notices may not be filed jointly for a group, a class, or for multiple persons or entities.

(c) *Means of filing a notice of a third-party claim.* A notice of a third-party claim must be submitted in writing by mail through the USPS or by a commercial delivery service. While the Deputy General Counsel will affirmatively acknowledge receipt of a notice of a third-party claim, it is recommended that a requester, whether using the USPS or a commercial delivery service, mail its notice by registered or certified mail, return receipt requested, or equivalent proof of delivery.

(d) *Information to be included in a notice to DoD of a third-party claim.* A notice to DoD of a third-party claim must include, at a minimum, the following information:

(1) A complete copy of the third-party claim, or, if not presented in writing, a complete summary of the claim, with the names of officers, employees, or agents with knowledge of any information that may be relevant to the claim or any potential defenses. The third-party claim may consist of a summons and complaint or, in the case of a third-party claim from a governmental regulatory authority, a notice, letter, order, compliance advisory, compliance agreement, or similar notification.

(2) A complete copy of all pertinent records, including any deed, sales agreement, bill of sale, lease, license, easement, right-of-way, or transfer document for the facility for which the third-party claim is made.

(3) If the requester is not the first transferee from DoD, a complete copy of all intervening deeds, sales agreements, bills of sale, leases, licenses, easements, rights-of-way, or other transfer documents between the original transfer from DoD and the transfer to the current owner. If the requester is a lender who has made a loan to a person

or entity who owns, controls, or leases the facility for which the request for indemnification is made that is secured by said facility, complete copies of all promissory notes, mortgages, deeds of trust, assignments, or other documents evidencing such a loan by the requester.

(4) A complete copy of any insurance policies related to such facility.

(5) If the notice to DoD of a third-party claim is being made by a representative, agent, or attorney in fact or at law, proof of authority to make the notice on behalf of the requester.

(6) Evidence or proof of any claim, loss, or damage alleged to be suffered by the third-party claimant which the requester asserts is covered by section 330 or by section 1502(e).

(7) In the case where a requester intends to enter into, agree to, settle, or solicit a third-party claim, a description or copy of the proposed claim, settlement, or solicitation, as the case may be.

(8) To the extent that any environmental response action has been taken, the documentation supporting such response action and its costs included in the request for indemnification.

(9) To the extent that any environmental response action has been taken, a statement as to whether the remedial action is consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (part 300 of title 42, Code of Federal Regulations) or other applicable regulatory requirements.

(10) A complete copy of any claims made by the requester to any other entity related to the conditions on the property which are the subject of the claim, and any responses or defenses thereto or made to any third-party claims, including correspondence,

litigation filings, consultant reports, and other information supporting a claim or defense.

(e) *Entry, inspection, and samples.* The requester must provide DoD a right of entry at reasonable times to any facility, establishment, place, or property under the requester's control which is the subject of or associated with the requester's notice of third-party claim and must allow DoD to inspect or obtain samples from that facility, establishment, place, or property.

(f) *Additional information.* The Deputy General Counsel will advise a requester in writing of any additional information that must be provided to defend against a claim. Failure to provide the additional information in a timely manner may result in denial of a request for indemnification or defense for lack of information to adjudicate the claim.

(g) *When to file a notice to DoD of a third-party claim.* (1) A requester must, within 15 days of receiving a third-party claim, file with DoD a notice of such claim in accordance with this part. Failure to timely file such a notice, if it in any way compromises the ability of DoD to defend against such a claim pursuant to section 330(c) or section 1502(e)(3), will result in denial of any subsequent request for indemnification or defense resulting from such a claim. Requesters who take action in compliance with any such third-party claim, or any part of such claim, without first providing DoD with a notice of such claim in accordance with this section do so at their own risk.

(2) A requester must, at least 30 days prior to the earlier of entering into, agreeing to, settling, or soliciting a third-party claim, file a notice to DoD of such intent in accordance with this part. Failure to file such a notice will compromise the ability of DoD to defend against such a claim pursuant to section 330(c) or section 1502(e)(3) and will result in denial of any subsequent request for indemnification or defense resulting from such a claim.

(3) A requester may, if it believes more immediate notice to DoD is desirable or less than all the information required by paragraph (d) of this section is immediately available, contact the Deputy General Counsel using the phone numbers in paragraph (a)(1) of this section. Any such contact does not constitute compliance with the requirements of paragraph (g)(1) or (2) of this section unless and until the Deputy General Counsel subsequently provides written confirmation that the notice constitutes such compliance. Such written confirmation may be provided by electronic means.

(h) *No implication from DoD action.* Any actions taken by DoD related to defending a claim do not constitute a decision by DoD that the requester is entitled to indemnification or defense.

(i) *Notice also constituting a request for indemnification or defense.* Notice of receipt of a third-party claim may also constitute a request for indemnification or defense if that notice complies with all applicable requirements for a request for indemnification or defense.

§ 175.6 Filing a request for indemnification or defense.

(a) *Where to file a request for indemnification or defense.* (1) In order to notify DoD in accordance with section 330(b)(1) or section 1502(e)(2)(A), a request for indemnification or defense pursuant to section 330 or section 1502(e) must be received by the Deputy General Counsel at the following address:

Deputy General Counsel
Environment, Energy, and Installations
1600 Defense Pentagon, Room 3B747
Washington, DC 20301-1600
(703-693-4895) or (703-692-2287)

(2) Delivering or otherwise filing a request for indemnification or defense with any other office or location will not constitute proper notice of a request for purposes of section 330(b)(1) or

section 1502(e)(2)(A). Requesters should be aware that all delivery services, and particularly that of the USPS, to the Pentagon can be significantly delayed for security purposes and they should plan accordingly in order to meet any required filing deadlines under this part; use of a commercial delivery service may reduce the delay.

(b) *When to file a request for indemnification or defense.* A request for indemnification must be received by the Deputy General Counsel within two years after the claim giving rise to the request accrues. A request for defense must be received by the Deputy General Counsel in sufficient time to allow the United States to provide the requested defense.

(c) *Means of filing a request for indemnification or defense.* A request for indemnification or defense must be submitted in writing by mail through the USPS or by a commercial delivery service. While the Deputy General Counsel will affirmatively acknowledge receipt of a request for indemnification or defense, it is recommended that a requester, whether using the USPS or a commercial delivery service, mail its request by registered or certified mail, return receipt requested, or equivalent proof of delivery.

(d) *Individual requests.* A request for indemnification or defense must be filed separately for each person or entity that is making the request. Requests may not be filed jointly for a group, a class, or for multiple persons or entities.

(e) *Information to be included in a request for indemnification or defense.* A request for indemnification or defense must include, at a minimum, the following information:

- (1) A complete copy of the third-party claim, or, if not presented in writing, a complete summary of the claim, with the names of officers, employees, or agents with knowledge of any information that may be relevant to the claim or any potential defenses.
- (2) A complete copy of all pertinent records, including any deed, sales agreement,

bill of sale, lease, license, easement, right-of-way, or transfer document for the facility for which the request for indemnification or defense is made.

(3) If the requester is not the first transferee from DoD, a complete copy of all intervening deeds, sales agreements, bills of sale, leases, licenses, easements, rights-of-way, or other transfer documents between the original transfer from DoD and the transfer to the current owner. If the requester is a lender who has made a loan to a person or entity who owns, controls, or leases the facility for which the request for indemnification is made that is secured by said facility, complete copies of all promissory notes, mortgages, deeds of trust, assignments, or other documents evidencing such a loan by the requester.

(4) A complete copy of any insurance policies related to such facility.

(5) If the request for indemnification or defense is being made by a representative, agent, or attorney in fact or at law, proof of authority to make the request on behalf of the requester.

(6) Evidence or proof of any claim, loss, or damage covered by section 330 or by section 1502(e).

(7) In the case of a request for defense, a copy of the documents, such as a summons and complaint, or enforcement order, representing the matter against which the United States is being asked to defend.

(8) To the extent that any environmental response action has been taken, the documentation supporting such response action and its costs included in the request for indemnification.

(9) To the extent that any environmental response action has been taken, a statement as to whether the remedial action is consistent with the National Oil and

Hazardous Substances Pollution Contingency Plan (part 300 of title 42, Code of Federal Regulations) or other applicable regulatory requirements.

(10) A complete copy of any claims made by the requester to any other entity related to the conditions on the property which are the subject of the claim, and any responses or defenses thereto or made to any third-party claims, including correspondence, litigation filings, consultant reports, and other information supporting a claim or defense.

(f) *Entry, inspection, and samples.* The requester must provide DoD a right of entry at reasonable times to any facility, establishment, place, or property under the requester's control which is the subject of or associated with the requester's request for indemnification or defense and must allow DoD to inspect or obtain samples from that facility, establishment, place, or property.

(g) *Additional information.* The Deputy General Counsel will advise a requester in writing of any additional information that must be provided to adjudicate the request for indemnification or defense. Failure to provide the additional information in a timely manner may result in denial of the request for indemnification or defense.

(h) *Adjudication.* The Deputy General Counsel will adjudicate a request for indemnification or defense and provide the requester with DoD's determination of the validity of the request. Such determination will be in writing and sent to the requester by certified or registered mail.

(i) *Reconsideration.* Any such determination will provide that the requester may ask for reconsideration of the determination. Such reconsideration shall be limited to an assertion by the requester of substantial new evidence or errors in calculation. The requester may seek such

reconsideration by filing a request to that effect. A request for reconsideration must be received by the Deputy General Counsel within 30 days after receipt of the determination by the requester. Such a request must be sent to the same address as provided for in paragraph (a)(1) of this section and provide the substantial new evidence or identify the errors in calculation. Such reconsideration will not extend to determinations concerning the law, except as it may have been applied to the facts. A request for reconsideration will be acted on within 30 days from the time it is received. If a request for reconsideration is made, the six month period referred to in section 330(b)(1) and section 1502(e)(2)(A) will commence from the date the requester receives DoD's denial of the request for reconsideration.

(j) *Finality of adjudication.* An adjudication of a request for indemnification constitutes final administrative disposition of such a request, except in the case of a request for reconsideration under paragraph (i) of this section, in which case a denial of the request for reconsideration constitutes final administrative disposition of the request.

Dated: July 16, 2018.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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